

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Robert L. Christopherson,

Petitioner,

vs.

City of Albert Lea,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATIONS**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick at 10:00 a.m. on September 6, 2001 at the Commissioner's Board Room, Freeborn County Courthouse, 411 Broadway, Albert Lea, Minnesota.

The Petitioner, Robert L. Christopherson, 2311 Forest Avenue, Albert Lea, Minnesota 56007, appeared on his own behalf. Steven R. Schwab, Albert Lea City Attorney, 221 East Clark Street, Albert Lea, Minnesota 56007, appeared on behalf of the Respondent, City of Albert Lea (hereinafter "the City"). The record of the proceeding closed on September 19, 2001, upon receipt of the last of the parties' post-hearing briefs.

NOTICE

This Report is a recommendation and not a final decision. After a review of the record, the Commissioner of the Minnesota Department of Veterans Affairs will make the final decision, in which he may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Jeffrey L. Olson, Commissioner, Minnesota Department of Veterans Affairs, Veterans Service Building, St. Paul, Minnesota 55155-2079, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are:

1. Whether the position Mr. Christopherson sought with the City of Albert Lea is subject to the hiring requirements of the Veterans Preference Act.
2. Whether Mr. Christopherson was denied any rights relating to the filling of that position under the Veterans Preference Act.
3. Whether Mr. Christopherson should be awarded backpay and instatement to that position under the Veterans Preference Act.

Based upon all of the files, records, and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mr. Christopherson served in the United States Army on active duty from January 12, 1955, until December 23, 1956.^[1] He received an honorable discharge from the Army.

2. In June 2000, Mr. Christopherson retired from his long-time employer. In talking to some of his friends, Mr. Christopherson learned that the City of Albert Lea (the City) was in the practice of hiring persons to work in the parks over the summer months. In January 2001, Mr. Christopherson completed an application for a position conducting Parks Maintenance and filed the application with the City.

3. Mr. Christopherson saw an advertisement run by the City in the Albert Lea Tribune on February 4, 2001.^[2] That advertisement stated that "Albert Lea Parks & Recreation is now accepting applications for the summer of 2001"^[3] The advertisement listed a number of positions, including Playpark Leaders, Youth Baseball/Softball Umpires, Lifeguards, and Parks Maintenance. The wage range for Parks Maintenance positions was \$6.50 to \$8.50 per hour. The deadline for applications was March 31, 2001.

4. The City employs between 18 to 22 persons in seasonal Parks Maintenance positions, beginning in mid-April and running until late August for most of them.^[4] For a few employees, the position starts later and ends in November. No person in a seasonal Parks Maintenance position is allowed to work continuously for more than six months. The few employees who work over the winter must be off of the City's payroll for at least 30 days.

5. The City sends letters to persons who worked the seasonal positions and had satisfactory work performance. The letters inquire as to whether the person would like to return. The City policy is to rehire such persons because of their experience, but to require them to fill out new applications. Occasionally a Parks Maintenance worker from a prior year has been allowed to return to the position without having filled out a

new paper application. These workers telephoned Mr. Grossman, Park Superintendent for the City, and asked to be rehired for the summer.

6. Mr. Grossman interviewed Mr. Christopherson in April 2001. The interview lasted about twenty minutes. The job requirements were discussed. Mr. Christopherson noted that he was a veteran. Mr. Grossman told Mr. Christopherson that there was no knowing how many positions needed to be filled, since preference was given to those people who had satisfactorily worked the jobs in previous summers.

7. Mr. Grossman considered Mr. Christopherson qualified for the position because of his prior experience maintaining a golf course. He thought Mr. Christopherson might fit into one position well, but did not know at the time whether the prior employee would be returning.

8. Mr. Grossman filled the Park Maintenance positions available, but did not hire Mr. Christopherson. Three of the Parks Maintenance workers hired for the summer of 2001 first began in that position in the summer of 2000. Two of the Parks Maintenance workers had been working in that position for several years.

9. Mr. Christopherson waited for approximately eleven weeks for contact from the City. He spoke to a County Veterans Service Officer, who indicated that, as a veteran, the City should have notified Mr. Christopherson of the reason for not hiring him.

10. On July 17, 2001, Mr. Christopherson filed a Petition for Relief with the Department of Veterans Affairs. He asserted that the City had failed to properly award veterans preference points in hiring.^[5] A Notice of Hearing was served on the City on August 10, 2001, setting this matter on for contested case hearing.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Under Minn. Stat. §§ 14.50 and 197.481, the Commissioner of Veterans Affairs and the Administrative Law Judge have authority to consider the issues raised under the Veterans Preference Act, Minn. Stat. §§ 197.455-197.481, in this proceeding.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all relevant, substantive and procedural requirements of statute and rule.

3. The City received timely and proper notice of the hearing.

4. Mr. Christopherson is an honorably discharged veteran within the meaning of Minn. Stat. §§ 197.447 and 197.455 and is entitled to all of the protections and benefits afforded by the Veterans Preference Act.

5. The City is a political subdivision of the state within the meaning of Minn. Stat. § 197.455, and its personnel practices are therefore subject to the provisions of the Veterans Preference Act.

6. The requirement of the Veterans Preference Act, Minn. Stat. § 197.455, that a veteran is entitled to preference in hiring, does not apply when the position being filled is temporary employment.^[6]

7. Whether the position being filled is temporary is an affirmative defense for which the public employer has the burden of proof.^[7]

8. The seasonal Park Maintenance positions filled by the City are temporary positions.

9. The City did not violate the Veterans Preference Act by filling the Park Maintenance positions without affording Veterans Preference in hiring.

10. Mr. Christopherson was not denied any Veterans Preference rights by the City's hiring process.

11. Any Conclusion more properly termed a Finding is hereby adopted as such.

Based upon the foregoing Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Petition of Robert L. Christopherson be DENIED.

Dated this 27th day of September 2001.

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape Recorded (one hearing tape); No Transcript Prepared.

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NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Minn. Stat. § 197.455 imposes the requirements of Minn. Stat. 43A.11 for Veterans Preference in hiring by local units of government. Veterans Preference in hiring takes the form of an additional five points added to the competitive examination score of a nondisabled veteran.^[8] There was no scoring done of any competitive examination for the Parks Maintenance position. Mr. Christopherson maintains that the City's hiring process denied him his Veteran's Preference.^[9]

There is no dispute that Mr. Christopherson is an honorably discharged veteran who is entitled to the protections of the Veterans Preference Act to the extent that those protections are applicable. The City asserts that the summer positions being filled, including the Parks Maintenance position sought by Mr. Christopherson, are temporary positions that are not subject to the veterans preference requirements of Minn. Stat. § 197.455.

Asserting that a position is not subject to veterans preference is an affirmative defense for which the employer has the burden of proof.^[10] In determining whether a position is not in the classified service, the reviewing tribunal must examine the substance of the position and not just its title.^[11] The ultimate questions, to be determined by a preponderance of the evidence, are whether the position exists only for a limited period of time and whether the employment relationship established endures beyond the limited time of the work to be done. Ultimately, the question is whether the defense is asserted properly or whether the reasons given by the public body are merely a subterfuge to avoid the requirements of Veterans Preference.^[12]

Veterans Preference in hiring does not apply to temporary, unclassified positions with the State.^[13] Similarly, temporary employment with political subdivisions is not

subject to the requirements of Veterans Preference.^[14] When this issue was addressed in a previous contested case, the Administrative Law Judge there described the appropriate analysis as:

Whether a position is temporary or permanent depends on all of the facts and circumstances. **Crnkovich**, at 287. Facts and circumstances which demonstrate that the employment was for a fixed term or for a temporary purpose support a finding of temporary rather than permanent. **Crnkovich**, at 286.^[15]

Mr. Christopherson characterized the positions as “permanent seasonal positions.”^[16] The City maintains that the positions are temporary. The positions last only for the summer season. The City has an application process to fill these positions that is used every year. The persons in those positions from the previous year are told that they must file a new application to work in that position next year. In some instances, employees from the previous year have contacted the City and indicated that they are willing to do that work again. The City accepts that contact as an application, but reminds the employee that a written application should be filed. The City has declined to offer renewed employment to persons who did not meet expectations. These facts demonstrate that the positions are temporary and therefore the hiring requirements of the Veteran’s Preference Act do not apply.

The City’s practice of filling some of the positions with the prior year’s employees is cited by Mr. Christopherson as proof that the positions are permanent.^[17] The City points out that the employee in **Crnkovich** was held to occupy a temporary position, even though that employee returned to employment over three consecutive years.^[18] The nature of the position cannot be changed merely by who occupies that position. The City’s use of experienced persons to fill temporary positions is a sound hiring practice. Since the Veterans Preference Act does not govern the hiring process, providing preference to the prior year’s employees is not an improper hiring practice.

The City has met its burden to show that the positions it filled were temporary and not governed by the Veterans Preference Act. With the Veterans Preference Act inapplicable, Mr. Christopherson is not entitled to be appointed to the position or backpay. Therefore, the Administrative Law Judge recommends that the veteran’s petition be DENIED.

S.M.M.

^[1] Petition for Relief under the Veterans Preference Act, Attached Form DD-214.

^[2] Petition for Relief under the Veterans Preference Act, Attached Classified Advertisement Photocopy.

^[3] *Id.*

^[4] Grossman Testimony.

^[5] Exhibit 1.

^[6] **Crnkovich v. Independent School District No. 701**, 142 N.W.2d 284 (Minn. 1966).

^[7] **State ex rel. Caffrey v. Metropolitan Airport Commission**, 246 N.W.2d 637 (Minn. 1976); cf. **Southern Minnesota Municipal Power Agency v. Schrader**, 394 N.W.2d 796, 802 (Minn. 1986).

^[8] Minn. Stat. 43A.11, subd. 3. The five-point preference is on a one hundred-point scale. **Hall v. City of Champlin**, 463 N.W.2d 502, 504 (Minn. 1990).

^[9] The additional points may increase a veteran's rank on the list and thereby improve the veteran's chances of being interviewed. There is no Veteran's Preference beyond that. Since Mr. Christopherson was interviewed, he would have received nothing more even if the City had given veterans additional points.

^[10] See, e.g., **State ex rel. Caffrey v. Metropolitan Airport Commission**, 246 N.W.2d 637 (Minn. 1976); cf. **Southern Minnesota Municipal Power Agency v. Schrader**, 394 N.W.2d 796, 802 (Minn. 1986).

^[11] **Myers v. City of Oakdale**, 409 N.W.2d 848, 850 (Minn. 1987).

^[12] **Caffrey**, *supra*, 246 N.W.2d at 641; **State ex rel. Niemi v. Thomas**, 27 N.W.2d 155, 157, 223 Minn. 435, 438 (Minn. 1947).

^[13] **McAfee v. Department of Revenue**, 514 N.W.2d 301 (Minn. App. 1994).

^[14] **Crnkovic**, 142 N.W.2d, at 286-87.

^[15] **Jerome H. McGough v. Red Wing Port Authority**, OAH Docket No. 91-3100-10564-2 (Recommendation issued November, 1996).

^[16] Christopherson Brief, at 1.

^[17] The City of Minneapolis has a classification for employees who truly did have permanent, seasonal employment. **In the Matter of Certain Petitions for Relief under the Veterans Preference Act**, OAH Docket No. 5-3100-7392-2 (Order on Summary Disposition issued November 1993). These employees did not reapply for positions at the beginning of the work season. They were informed where to report to begin work in the following season. These employees were also on call to work in the intervening time between their normal working seasons. The differences between the City's practice and facts in **ITMO Certain Positions**, *supra*, support the conclusion that the City was filling temporary positions.

^[18] City Brief, at 2.